PANG PO PAH, RE

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CRIMINAL REVISION NO. 1 OF 1982]
29 APRIL 1982

CRIMINAL PROCEDURE: *Preliminary enquiry - Duty and powers of Magistrate - Whether Magistrate empowered to frame charges other than the tentative charge - Whether a tentative charge in a preliminary enquiry as a formal charge - Offence disclosed in evidence is neither trial by him summarily or by the High Court - Procedure - Whether the term " some other Magistrate" in s. 140 (i)(b) Criminal Procedure Code includes President, Sessions Court.*

CRIMINAL PROCEDURE: *Revision - Duty of Judge - Whether should confine to matters raised by the parties alone - Powers to pry into the deeper aspects of the case.*

The revision was on the application of the learned Deputy Public Prosecutor against the decision of the learned Magistrate at Melaka in reference to a preliminary enquiry on 21 October 1981 into an offence of murder under s. 302 of the Penal Code. The learned Magistrate purporting to act under Chapter XVII of the Criminal Procedure Code committed the accused for trial at the High Court not on the tentative charge of murder as submitted by the prosecution, but on a lesser charge under s. 304 of the Penal Code. The learned Deputy Public Prosecutor was of the view that the Magistrate had acted in excess of the powers conferred by s. 140 & 141 of the Criminal Procedure Code as he contended that s. 140 merely empowers the examining Magistrate to either commit the accused person to trial at the High Court or to discharge him or, if the evidence discloses an offence which was within his jurisdiction to try, he may proceed to try the case summarily or order him to be tried before another Magistrate. Counsel for the accused however was convinced that the Magistrate possessed complete liberty to commit the accused to trial to the High Court on whatever charge.

However, although the learned Deputy Public Prosecutor's point raised in the revision related only to the question of legality to frame charges other than the one tendered by the prosecution, the learned Judge dealt with the following questions commonly encountered by the Magistrates when conducting preliminary enquiries, *viz*:-

(i) Whether the Magistrate is empowered to commit the accused person on a charge other than the one tentatively placed before him by the prosecution at the commencement of the enquiry.

(ii) Whether the accused in this case has been properly committed to stand trial at the High Court under s. 304 of the Penal Code;

(iii) The option available to an examining Magistrate where the offence disclosed in evidence at the preliminary enquiry is neither triable by him summarily or by the High Court.

Held:

[1] An examining Magistrate in a preliminary enquiry may frame charges on any offence triable in the High Court as he finds in the evidence and he may depart from the tentative charge as submitted by the prosecution.

[2] In this subject matter, the learned Magistrate had acted improperly by committing a case not ordinarily triable by a High Court to this Court for trial.

[3] He may, when the preliminary enquiry evidence discloses an offence triable by a Sessions Court, frame a charge for that offence and, in accordance with s. 141 (i)(b) read with s. 177, transfer the case to be tried by a President Sessions Court.

[4] The term "some other Magistrate" in s. 140 (i)(b) must be read to include the President of the Sessions Court.

[5] The overall object of ss. 140, 141 & 142 is to enable the Magistrate to do one of these three things, i.e. either to discharge the accused person, or to commit him to trial to a High Court or to try the case summarily.

[6] The duty of a Judge sitting in his revisionary capacity is not confined to matters raised by the parties alone. He may in appropriate circumstances pry into the deeper aspects of the case so as to ensure substantial justice subsists not only between the accused and the accuser but also between the accused and others who might suffer from his lethiferous deed.

[7] As a *prima facie* case of murder under s. 302 of the Penal Code had been made out at the enquiry the order of the Magistrate was set aside and he was directed to draw a charge under s. 302 of the Penal Code against the accused and to commit him for a trial to the High Court.

[Magistrate's order set aside. Magistrate directed to commit accused to High Court for trial under s. 302 Penal Code.]

Cases referred to:
Mohamed Kunju v. Public Prosecutor [1966] 1 MLJ 271
R. v. Rider [1954] 1 All ER. 5
Goh Swee Joo & Ors. v. PP [1962] MLJ 29
Tan Kim Kang & Ors. v. PP [1962] MLJ 388

Legislation referred to:
Criminal Procedure Code, ss. 7, 140, (i)(b), 141, (i), 142, 177, 303A
Penal Code, ss. 302, 304

For the public prosecutor - C.W. Chan, DPP.
For the accused - F.H. D'Cruz

JUDGMENT

Wan Yahya J:

On 21 October 1981, pursuant to a preliminary enquiry into an offence of murder given to the Magistrate to frame a charge in accordance with the type of offence which he may find in the evidence.

The procedure to be adopted in a preliminary enquiry as laid down in Chapter XVII of the Criminal Procedure Code does nor provide for a charge to be framed and tendered by the prosecution; neither does it provide for such charge to be read out to the accused at the commencement of the enquiry. All it says is that the Magistrate should hear the case for the prosecution and then only decide whether to draw a charge, charges or discharge the accused person without making any charge at all. If the framers of the Code had intended otherwise, some mention of a charge being framed or tendered by the prosecution would have in the least been made in that chapter.

A tentative charge submitted to the Magistrate by the officer assisting in the conduct of a preliminary enquiry is not a formal charge. It is a mere reflection of the offence the prosecution has in mind the accused has committed. It does not confine the examining Magistrate to enquiring into the offence stated therein alone and neither does it restrict or limit such Magistrate's power to draft a charge or charges on whatever offences (preferring, of course, the more to the less serious ones), which, according to his judicious findings, is or are disclosed in the evidence; but if he commits the accused to stand trial in the High Court the committal must however be on an offence ordinarily triable by that Court. In *Mohamed Kunju v. Public Prosecutor* [1966] 1 MLJ 271 Raja Azlan Shah J (as he then was) cited with approval the following passage from *R. v. Rider* [1954] 1 All ER 5 at 6:

> I have come to the conclusion that the proper construction to put on the word 'charge' is that a man is charged before a Court which has jurisdiction to determine the mater in question .... But if justices commit a man for trial, they are not adjudicating on the case. The only thing they determine is whether there is a *prima facie* case to answer, and, if they think there is, they commit the accused. He is then brought before the Court at assizes or quarter sessions on indictment, and it seems to me that then, for the first time, he is before a Court having jurisdiction to determine the matter.

It is obvious from the above that the tentative charge usually submitted before the commencement of a preliminary enquiry is not a formal charge but merely an accusation of a probable offence and as such is not legally binding on the scope or extent of the examining Magistrate's enquiry.

The role of an examining Magistrate in a preliminary enquiry was discussed by Hashim J in *Goh Swee Joo & Ors. v. PP* [1962] MLJ 29 and more particularly in *Tan Kim Kang & Ors. v. PP* [1962] MLJ 388 wherein His Lordship said at p. 389:

> Section 141 of the Criminal Procedure Code read together with s. 142, in my opinion, would simply mean that all a Magistrate at a preliminary enquiry has to do is to see whether there is any evidence of any offence which is triable in the High Court and if there is he is duty bound to commit the accused person for trial.

Putting it in other words, an examining Magistrate is duty bound to commit an accused person to stand trial for the seriousmost offence or offences which, according to his judicial finding, is ordinarily triable in the High Court. It does not matter if that offence falls short of the expectation by the prosecution so long as it is one ordinarily triable by a High Court.

My answer to the point (ii) above is that the accused has not been properly committed to attend trial in this Court. As discussed earlier, an examining Magistrate may commit to trial an accused person charged with an offence ordinarily triable in the High Court. Before the amendment to the Subordinate Courts Act by Act A 434/788 it was proper for a Magistrate to commit a person for trial under s. 304 of the Penal Code but, as from 1 July 1978, s. 304 has been placed within the jurisdiction of the Sessions Court and therefore is no longer a case ordinarily triable in the High Court. I am mindful of the fact that in appropriate circumstances the High Court may summarily hear and dispose of cases triable in the lower Courts, but that is an exception rather than the rule and is exercisable only under particular circumstances. If a Magistrate is freely allowed to commit any case not triable by him to this Court, then the High Court may find itself heavily encumbered with the burden of disposing of cases triable by Courts of inferior jurisdiction.

This brings me to the third point and that is, what option has a Magistrate when the evidence introduced by the prosecution discloses, according to his judicial finding, an offence triable ordinarily in the Sessions rather than the High Court.

Section 140(i)(b) in effect states that he may transfer the case to be summarily tried by some other Magistrate. The Criminal Procedure Code is silent on the jurisdictive authority of this other Magistrate. It was suggested at one point during the hearing that the term will not include a President of the Sessions Court. The Sessions Court is a creation of the Subordinate Courts Act, 1948, but is only mentioned briefly in the definition of 'Court'. The term 'President Sessions Court' is never referred to specifically. However, there is no doubt that the procedures as provided by the Code are generally applicable by virtue of s. 7 of the Criminal Procedure Code to the Sessions Court, as they do to all Courts exercising criminal jurisdiction. When the Criminal Procedure Code was framed, the division of jurisdiction was one between the Magistrates' Court and the High Court only. What was not triable by a Magistrate's Court then was triable by a High Court and conversely offences which were not summarily triable by a High Court were those over which the Magistrate's Court had jurisdiction to try. I am of the view that the same division of jurisdiction applies to when considering s. 140 of the Code with the Magistrate's Court and Sessions Court being grouped together as Subordinate Courts on one side and the High Court on the other. Offences which are not summarily triable in the High Court are triable in the Subordinate Court, i.e., the Magistrate's Court and the Sessions Court. The overall object of ss. 140, 141 and 142 is to enable the Magistrate to do one of these three things, i.e., either to discharge the accused person, or to commit him to trial to a High Court, or to try the case summarily. To transfer a case to the Sessions Court is tantamount to having the case tried summarily. I am of the firm view that this is the intention of the framers of the Code. The term 'some other Magistrate' must be read to include the President of the Sessions Court if their intention is to be effective. The object of s. 140 is not only to enable a Magistrate to commit an accused person to trial in the High Court for an offence triable therein but also where he finds no High Court case for committal, to take cognizance and to proceed to try other offences triable even buy the Courts of lowest jurisdiction. It would be absurd in that case to say that the legislature did not intend that he should take steps to initiate proceedings against Sessions Court cases when it sanctions him to do so in the case of offences punishable in the Magistrate's and High Courts, i.e., Courts of the lowest and highest jurisdiction. To construe otherwise would only lead to the absurd position of having a class of offences which a Magistrate is cognizant of but in respect of which he is not sanctioned to proceed with. I would therefore hold that the term 'some other Magistrate' in s. 140 (i)(b) will include a President Sessions Court.

By analogy I find some support for this proposition from the addition by way of amendment in s. 303A, which reads:

> 303A. Any reference in this Chapter to a Magistrate and a Magistrate's Court shall be deemed to include a reference to a President of Sessions Court, or a Sessions Court, as the case may be and the expression "Magistrate" and "Magistrate's Court" shall be construed accordingly.

Likewise I find the provision in s. 177 enabling a Magistrate to transfer a case which, in his opinion, ought to be tried by 'some Court of higher jurisdiction than his own' as an indication of the intention of the legislature to enable cases which are not triable by a Magistrate to be tried by the President Sessions Court summarily without having to resort to the powers of the High Court.

To sum up briefly the rulings I would say:

(i) An examining Magistrate in a preliminary enquiry may frame charges on any offence triable in the High Court as he finds in the evidence and he may depart from the tentative charge as submitted by the prosecution.

(ii) In the matter before us the learned Magistrate had acted improperly by committing a case not ordinarily triable by a High Court to this Court for trial.

(iii) He may, when the preliminary enquiry evidence discloses an offence triable by a Sessions Court, frame a charge for that offence and, in accordance with s. 141(i) read with s. 177, transfer the case to be tried by a President Sessions Court.

Having dealt with the various points involved I will now turn to the facts and nature of this enquiry itself. The duty of a Magistrate in a preliminary enquiry is to determine from the evidence presented to him by the prosecution whether a *prima facie* case exists to warrant an order of committal for trial to the High Court being made against the accused person. When doing so it is not part of his duty to weigh the evidence as if he was himself trying the case, or to deliberate upon and make appraisal of the prosecution witnesses' testimony as against the defence counsel's submission, nor is he expected to contemplate the accused's possible lines of defence. Once the bare ingredients of any offence triable by the Court of a Judge has been presented to him, his duty is to make the order of committal and not usurp the more intricate duty of assessing the credibility of facts from the body so authorized to perform that function, i.e., the jury.

Perhaps in his eagerness to drive home what he considers to be an important point of law, the learned DPP overlooked to present any appreciable submission on the matter just stated. The duty of a Judge sitting his revisionary capacity is not confined to matters raised by the parties alone. He may in appropriate circumstances pry into the deeper aspects of the case so as to ensure substantial justice subsists not only between the accused and the accuser but also between the accused and others who might suffer from his lethiferous deed.

According to the records, there exists unimpeached evidence of the prosecution witnesses to show that the accused pursued the deceased over a considerable period and stabbed him with a pair of scissors and from this injury the victim died. The evidence on this, to my mind, is sufficient for the Magistrate to commit the accused to trial on the charge of murder.

It appears to me that the learned Magistrate in this case was labouring under a misapprehension as to his duty when functioning as a Magistrate in a preliminary enquiry.

I am of the opinion that a *prima facie* case of murder under s. 302 has been made out at the enquiry and for that reason I set aside the order of the Magistrate and direct him to draw a charge under s. 302 of the Penal Code against the accused and to commit him for trial to the High Court.

Also found at [1982] CLJ 557